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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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3 In re: WTC Lower Manhattan Disaster 21 MC 102  
3 Site Litigation

4 -----x

New York, N.Y.  
April 18, 2013  
3:15 p.m.

7 Before:

8 HON. ALVIN K. HELLERSTEIN

District Judge

10 APPEARANCES

11 GREGORY J. CANNATA & ASSOCIATES  
11 Attorneys for Plaintiffs  
12 BY: GREGORY J. CANNATA

13 ROBERT A. GROCHOW, P.C.  
13 Attorneys for Plaintiffs  
14 BY: ROBERT A. GROCHOW

15 NAPOLI BERN RIPKA SHKOLNIK LLP  
15 Attorneys for Plaintiffs  
16 BY: PAUL J. NAPOLI  
16 DIONISIOS GEORGATOS

17 HARRIS BEACH PLLC  
18 Attorneys for Defendant Century 21  
18 BY: STANLEY GOOS

19 MCGIVNEY KLUGER, P.C.  
20 Attorneys for Various Defendants  
20 BY: RICHARD E. LEFF

21 KIRKLAND & ELLIS LLP  
22 Attorneys for Defendant Verizon New York  
22 BY: LEE ANN STEVENSON

24 ALSO PRESENT  
24 Special Master Jim Anderson

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1 (Case called)

2 THE COURT: This is a progress conference to see how  
3 we are doing. The last event in this case was on March 21,  
4 2013 when I entered a case management order regulating  
5 discovery and trials of various cases that we will be  
6 selecting.

7 The first date on here is August 30, 2013 which is the  
8 adjourn date, several times adjourned of the completion of fact  
9 discovery. I have said this in the past with earlier dates,  
10 but I want to emphasize it now. I am not going to enlarge this  
11 again. That date is engraved in stone -- stone that will last  
12 as long as this case and longer. I expect that all of these  
13 dates will also be fixed. And the other date that is engraved  
14 in stone is May 5, 2014 which will be the first trial  
15 commencement. And there may be other trials at that time or  
16 sequentially following it. I just want all of you to have very  
17 clear notice that these schedules are binding, particularly,  
18 the first and the last.

19 Anybody want to comment to me about where you are and  
20 what problems you might be having?

21 MR. CANNATA: Good afternoon, your Honor.

22 Your Honor, at the last conference that we had on  
23 February 22nd, concerning the worker's compensation liens, your  
24 Honor, I reported to your Honor that I had been in discussions  
25 with all the carriers, and there were many of them that were

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1 inclined to agree to the same arrangement, the same compromise  
2 as was reached in the 21 MC 100 case.

3 I am happy to tell the Court at this point, that I  
4 have entered into a written stipulations with six of the larger  
5 carriers. They cover approximately two-thirds of Mr. Grochow's  
6 and my clients.

7 In addition, we have several carriers who agreed to a  
8 case-by-case agreement rather than a blanket agreement. That  
9 covers about another dozen clients. I have been in discussion  
10 with approximately five other carriers, but we have yet to  
11 reach an agreement with them, although I am still discussing  
12 the matter with them. That covers approximately 15 or so out  
13 of my 85 clients.

14 THE COURT: What does that mean, 15 of your 85 clients  
15 are covered?

16 MR. CANNATA: 15 are not covered yet, but I have a  
17 deal in place --

18 THE COURT: 70 of your clients, if they experience a  
19 recovery by settlement or ultimate disposition, will not be  
20 subject to liens among the carriers?

21 MR. CANNATA: No. They will be subject to a 25  
22 percent lien, 25 percent of the lesser of the amount of the  
23 settlement or the present lien, and benefits will continue.  
24 That was the same arrangement that was reached in the 21 MC 100  
25 case for all of the carriers other than Liberty. So we made

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1 progress on that. We have not made complete progress yet, but  
2 we have made some considerable progress.

3 THE COURT: How have you done, Mr. Napoli?

4 MR. NAPOLI: I think it is more of the same, your  
5 Honor. We have had many of the carriers commit in 100 to  
6 committing in 102 to the same terms of the agreement. Other  
7 carriers really don't want to negotiate until there is a  
8 resolution and do it on a case-by-case basis.

9 THE COURT: How many carriers do you have tied up?

10 MR. NAPOLI: I think that we have tied up about a  
11 dozen carriers, your Honor. We think we have got the majority  
12 of our cases covered, either now or will have them covered when  
13 the time is ripe, at or near the time of settlement. There are  
14 continuing benefits that a lot of these people are receiving.  
15 And I think it is one aspect of an ultimate resolution that is  
16 going to have to await in a settlement on a case-by-case basis.

17 THE COURT: How do you want to use this information,  
18 Mr. Cannata, what practical effect will it have?

19 MR. CANNATA: The practical effect will be, it will be  
20 much easier to resolve the cases.

21 THE COURT: Are we at that point?

22 MR. CANNATA: No. We have made very little --  
23 actually no progress on that score.

24 THE COURT: Do you think you will?

25 MR. CANNATA: We had a conference with your Honor in  
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1 chambers --

2 THE COURT: Do you want to or are the cases in  
3 position to profit by discussion or is information still so  
4 evanescent that discussions would be premature?

5 MR. CANNATA: I think that the defendants and the  
6 plaintiffs at this point have a good feel for the merits of the  
7 case.

8 THE COURT: Maybe as to liability, what about damages?

9 MR. CANNATA: Defendants have conducted full  
10 depositions on eight of those plaintiffs, the first eight in  
11 wave 1 and have seen all of the medical records of those  
12 plaintiffs.

13 THE COURT: But you have 800.

14 MR. CANNATA: We have 30 more in phase 2. Those  
15 depositions go on for several days, so we are not going to have  
16 the depositions conducted within the next month or two. It is  
17 going to take longer than that.

18 THE COURT: It seems to me you are not close to  
19 settling the cases.

20 MR. CANNATA: There are different ways to settle a  
21 case, your Honor. We have had some discussions with the  
22 defendants. We were hoping that after we met with your Honor  
23 in chambers, we met with the defense lawyers on committee. We  
24 approached it with them as we will be happy to discuss it  
25 either as a global settlement or as a building-by-building

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1 settlement. We have made demands of each building on a  
2 building-by-building basis.

3 We also suggested perhaps a mediator, either a private  
4 mediator or a court-appointed mediator as your Honor suggested  
5 to do some of the buildings, maybe look at the plaintiffs in  
6 those buildings and try to come to an agreement as to one  
7 particular building and then use that as a framework for a  
8 larger settlement. The defendants want to confer with the  
9 large group. And we've gotten a response back from them saying  
10 that they want to do a global settlement, but that because our  
11 numbers are what they feel are too high, there is no point in  
12 discussing it with us.

13 THE COURT: Well, that seems a bit of information for  
14 many plaintiffs. I don't know how you have a principled basis  
15 for any kind of settlement.

16 MR. CANNATA: They have the medical records on the  
17 plaintiffs, your Honor. The only thing they are lacking at  
18 this point are depositions and physical examinations by a  
19 doctor. So that is not going to happen for the next five  
20 years. So if that is the position, then we will never have  
21 this case settled.

22 THE COURT: Mr. Leff, what do you think?

23 MR. LEFF: I don't know how long that is going to take  
24 but we are actively pursuing the depositions of the 30  
25 plaintiffs. We are going to be starting with plaintiffs'

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1 depositions actually next week. We are going forward with  
2 plaintiffs' treating depositions. Those are actually starting  
3 again also next week for the Group 1.

4 THE COURT: When do you think there will be a point  
5 that is reached that would be worthy of settlement discussions?

6 MR. LEFF: We have spoken with the larger defense  
7 group and the larger defense group is interested in having  
8 discussions on a global basis.

9 THE COURT: How can I approve a settlement if I don't  
10 have information?

11 MR. LEFF: We don't have enough information yet  
12 either, quite frankly. Having depositions of only eight  
13 plaintiffs just really is not enough.

14 THE COURT: I agree.

15 MR. LEFF: We found that the TCDI information as we  
16 deposed these plaintiffs varies drastically from the  
17 information we get out of the plaintiffs, so it will take a few  
18 more months.

19 THE COURT: That's why I say what I say. If the TCDI  
20 information had been reliable, they would provide a statistical  
21 dispersion that could justify settlement on an aggregate scale.  
22 But it is reported to me that they are not reliable, so  
23 depositions are necessary to determine the degree of  
24 reliability and the depositions are expensive and difficult and  
25 time-consuming. It seems to me from what you say that we are

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1 years away from the settlement.

2 MR. LEFF: I don't know about that. I think that the  
3 defendants are open-minded to having discussions. I think we  
4 need to go forward with discovery for a few months longer to  
5 see what we get out of this group and the data that we get as a  
6 result of these depositions and the independent medical  
7 examination results that we get from this group. And I think  
8 that this group intends to revisit this and engage in  
9 discussions eventually with the plaintiffs.

10 THE COURT: I don't know that I would be in a position  
11 to review a settlement for approval or disapproval without some  
12 kind of reliable statistical information that would show the  
13 justification, just the same way we had in the 100 case. I  
14 think we just have to go along with this schedule unless there  
15 is a way found to show reliability of the information produced  
16 in the core discovery phase.

17 MR. LEFF: I think we have to go along with the  
18 schedule for a while. We agree with you.

19 THE COURT: What else can I do for you?

20 MR. CANNATA: Let me just say, your Honor, that when  
21 we reached what we felt was a dead end with the larger group,  
22 the settlement of the entire litigation, we turned to talking  
23 to defendants on an individual basis. And that is actually  
24 proving, I believe, to be more fruitful to us because we have  
25 spoken to several buildings and defendants. They want to

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1 discuss the case. We are discussing it. We have not resolved  
2 any cases yet, but I believe that that is a fruitful pursuit  
3 and we are going to continue doing that.

4 THE COURT: Thank you, Mr. Cannata.

5 Is there anything else that I can do?

6 Jim?

7 SPECIAL MASTER ANDERSON: I can think of nothing.

8 THE COURT: Mr. Napoli.

9 MR. NAPOLI: We would ask on behalf of our clients, we  
10 think that discovery and trials lead to settlements. And we  
11 know the Court has now designated 38 cases for full discovery  
12 and a select group for trial in May. We would ask that more  
13 plaintiffs be set in additional groups for depositions now, for  
14 further selection later on for trial. We think that this will  
15 give additional information to the parties because these cases  
16 are unique in the sense that people worked in a variety of  
17 different buildings with a variety of different positions, with  
18 a variety of different exposures and that the 38 are  
19 insufficient to cover all of the various parameters that we are  
20 seeing in the plaintiff population. And if we can cluster  
21 additional cases, either another 30 or 50 or 100, and our  
22 office is willing to do those depositions, your Honor and  
23 prepared to do them forthwith, we think that that will  
24 accelerate the resolution of the case, and there is no doubt  
25 about it in my mind, certainly.

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1 THE COURT: Mr. Leff.

2 MR. LEFF: I think that the idea of it sounds good.

3 The fundamental problem is that the data in TCDI is not so  
4 good. So in order to select these cases, and what we found in  
5 these 30, we are selecting cases that are supposed to be some  
6 type of cross representations of the various injuries and we  
7 talked about tiers, Tiers II, III and IV, and we choose things  
8 based upon the information that is in TCDI, and if that  
9 information is inaccurate, you are sort of shooting in the dark  
10 and that is somewhat problematic.

11 THE COURT: I don't think, unless there is a consensus  
12 that you would be willing to add to the group, unless it were  
13 shown to me by motions that there is reliability in the  
14 statistical information.

15 MR. NAPOLI: I am saying, put aside the questions  
16 because there are only so many questions in TCDI, the answers  
17 by plaintiffs in the data, it is really a flat approach of  
18 looking at the case.

19 THE COURT: What does that mean?

20 MR. NAPOLI: You are not really getting the dynamic  
21 sense of who the plaintiff is, what they were doing, what the  
22 actual work was.

23 THE COURT: That was intended to be elicited by those  
24 questions.

25 MR. NAPOLI: But if it just doesn't come out the way

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1 it does in a deposition and these depositions going on for a  
2 few days. What I am suggesting, your Honor, is take it on a  
3 FIFO basis, the first cases filed --

4 THE COURT: I am unwilling to do that, Mr. Napoli. I  
5 am unwilling to do that for numbers of reasons.

6 MR. NAPOLI: Thank you, your Honor.

7 THE COURT: The selection process of going forward is  
8 intended to be based on a core of knowledge that is reliable  
9 and shared by all the parties, the special masters and the  
10 Court.

11 For various reasons about which I and the special  
12 masters have written articles in the Cornell Law Review and the  
13 Washington University Law Review, I am unwilling to do any kind  
14 of statistical sampling going forward without a body of  
15 reliable statistical information.

16 I disagree with you, Mr. Napoli. The core of  
17 discovery was intended to give us an ability to picture where  
18 people worked, how long they worked, for whom they worked, what  
19 their damages were, what their injuries were on an objective  
20 basis -- or as objective as possible -- and what their prior  
21 medical histories have been. And without that and other such  
22 information, it is not possible to project a reliable  
23 statistical sample other than to burden the case.

24 FIFO is not an appropriate procedure. It awards the  
25 plaintiff's lawyer who signed up a lot of players. It doesn't

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1 reward people who suffered substantial injuries and want to get  
2 recompensed. It only slows us up. We will go forward on this  
3 basis until we see that there is a better basis.

4 I need to set another meeting. You are finishing  
5 discovery August 30. On the assumption that, if I am needed  
6 for any discovery issue, you will let me know, we should meet  
7 in September. We will have a meeting the week of September  
8 15 -- September 17 at 2 o'clock. I will expect then to discuss  
9 the completion of discovery, whatever we learn from discovery,  
10 and if there are more cases that need to be put into the  
11 sample, but that will be on the eve of selecting Group 1 and  
12 Group 2 cases, with the idea of choosing five cases by  
13 plaintiffs, five by defendants, five by the special masters and  
14 me to comprise a 15-case trial group.

15 Thank you very much.

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